15-9-36

CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 913.

J. H. WHITE ET AL., APPELLANTS,

vs.

BOYD EWING, RECEIVER OF THE CARDIFF COAL AND IRON COMPANY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

FILED FEBRUARY 15, 1895.

(15,797.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 22, 1895.

1 United States Circuit Court of Appeals for the Sixth Circuit, October Term, 1893.

J. H. WHITE *et al.*, Appellants,
vs.
BOYD EWING, Receiver of the Cardiff Coal and Iron Co., Appellee.

No. 212. Cross-appeals from the Circuit Court of the United States for the Southern Division of the Eastern District of Tennessee.

(February 5, 1895.)

Before Taft and Lurton, circuit judges, and Severens, district judge.

By the COURT: The Cardiff Coal and Iron Company was a corporation organized under the laws of Tennessee with power to purchase real estate, to establish manufacturing plants thereon, to improve and subdivide the land, and to sell the same in lots. It sold many lots to different persons, more than one hundred in all, and took their notes in part payment of the purchase price therefor. It became financially embarrassed and the improvements begun by it were abandoned. Bosworth, a citizen of Massachusetts and a judgment creditor in the sum of $2,300.00, filed a general creditor's bill in the court below against the company. He alleged the insolvency of the company, the wasting of its assets by abandonment and his inability under the laws of Tennessee by reason of the encumbrance of a mortgage to levy execution on the real estate and improvements which with choses in action constituted the only available assets of the company, and he prayed for the sale of the property and the collection of its choses in action and the distribution of the proceeds among the creditors found to be entitled. He further asked the appointment of a receiver and an injunction against further disposition of assets by the company. A receiver was appointed and ordered to take possession of all the assets of the company and to manage and protect the same for the benefit of the creditors under order of the court. He was further ordered "to ascertain and report to the court what assets the company had, the kind and situation thereof and any proper steps to be taken in respect thereto, especially any debts or liabilities to the company and the amount and kind thereof."

Creditors were ordered to file their claims against the company in the court on or before a certain date and due publication of the order was ordered.

Subsequently the receiver filed the following petition in the case:

"To the judges of the circuit court of the United States for the southern division of eastern district of Tennessee:

"Your petitioner, Boyd Ewing, respectfully represents and shows the court that he was heretofore appointed receiver of this court in the above-named case, which is a general creditor's bill, brought to wind up the affairs of the defendant company as an insolvent corporation and to administer its assets for the benefit of its creditors.

2 The record of the case as made up to this time is referred to without going further into detail, which is not deemed necessary for the purpose of this petition. Petitioner as such receiver was directed in the order of appointment to make report to the July rules in regard to the debts, assets, property and general condition of the defendant company, which he has done. Petitioner shows the court that a large portion of the assets of said company consists of promissory notes due said company amounting in the aggregate to about the sum of $225,000.00, given for land purchased from said company, with liens retained to secure same. There are also debts by account to the amount of about $14,000.00 due said company. On all of said notes and accounts, your petitioner is informed and believes that it will be necessary to bring suit or suits to collect the same and he has been requested to bring such suits by the creditors in this court and comes by this petition for specific authority and directions to institute suit, and as to his duty in respect thereto. Petitioner is advised and informed that in order to save costs and the expense of many suits it is proper, if it may be done, to bring in all the debtors by bill or petition in the above case in one suit and is so requested by creditors.

"Petitioner further shows that to sue said debtors separately would require one hundred (100) suits or more with the enormous expense incident thereto. Petitioner further shows that it would be proper in his judgment to allow him to sell on such terms as he may think best certain personal property of defendant company on hand and of no use or service, consisting of surplus office furniture and fixtures, pipe-fittings, tools, hotel range, fixtures, etc., live stock and other personal property excepting notes and accounts, and petitioner asks authority in this respect also. Premises considered, petitioner prays for all such orders and directions as will enable him to fully discharge his duty in regard to the matters set forth in the foregoing petition, as well as for such general instructions, if any, as the honorable court may see proper to give."

Thereupon the court made the following order:

"At Chambers.

"NASHVILLE, TENN., *July 11th*, 1891.

"Upon application by the foregoing petition the receiver in this case is ordered and directed to institute suit by proper bill or petition in the pending case against all persons indebted to the defendant company (The Cardiff Coal & Iron Co.) by note or account as set forth in his petition. Such suit may be brought without any additional bond to that already given for costs of the principal cause.

"The receiver is also authorized and allowed to proceed to sell on such terms as he may deem best for the interest of all concerned, the personal property of said defendant company, referred to in his petion, and such other personal effects belonging to the said company, except the notes and accounts due it, as he may think best in ad-

vance of the hearing of the cause. He will report his action to the premises to the court after making sale of such personalty.

"An entry in conformity with this order and permission will be made by the clerk upon the minutes of the court in said cause.

"(Signed) HOWELL E. JACKSON,
"*Circuit Judge.*"

In pursuance of this order the receiver filed his bill in the cause as follows:

"Boyd Ewing, a citizen of Hamilton county, Tennessee, and receiver in the above cause, brings this bill and petition as such receiver in said cause against the defendants named below and residents and citizens of the places stated, to wit:"

(Here follow the names of one hundred and thirty persons, of whom thirty were alleged to be citizens of Tennessee and the remainder citizens of other States.)

The bill then proceeds:

"Said defendants above named are indebted to the Cardiff Coal and Iron Company by notes given for lots or parcels of land purchased from said company, it being a real-estate company. The amounts due from said defendants are shown below where the note or notes with dates when due and the parcel of land for which given, are stated in connection with the name of each defendant as follows:"

(Then is set forth a list of the defendants before named with the number and amount of the notes owing by them, together with the lot or lots for which each note was given. The amounts alleged to be due from the several defendants respectively were in most cases less than $2,000.00.)

The bill then proceeds:

"A map of said company's land is registered in the register's office of said Roane county, Tennessee, and a correct copy of the map is herewith filed as Exhibit No. 1 and made part hereof for further and perfect description of the lands, but not for copy.

"Special liens were retained in each case in the deed to each purchaser to secure the deferred payments of purchase-money, and copies of the deeds will be filed on or before the hearing if necessary. Your petitioner is advised that he has the right to have said liens in favor of said company so retained enforced in this court by sale of said lots in satisfaction of the balances of purchase-money and to have decrees against each and all of said defendants separately for the amounts due upon their several notes.

"In addition to the debts due said company for real estate purchased, the defendants below named are indebted to said company in the amounts and manner stated, with residence and citizenship stated, that is to say:"

(Then follows a list of debtors of the company not lot purchasers.)

The bill then proceeds:

"Petitioner is advised that he has a right to collect said debts and bring them into the office of this court for administration as part of the assets of said company, and for this purpose to have decrees

thereon. Your petitioner respectfully shows that some of said notes are in the possession of others by hypothecation or pledge as collateral security for debts, but the title is in said company, and your petitioner desires and is advised that he has the right to collect the same subject to the rights growing out of the pledge; and to have the balance of proceeds over and above the debts secured by the pledge brought into court as part of the assets to be administered as aforesaid, and for this purpose parties holding said collateral are in like manner made defendants hereto, and petitioner does not admit the validity of any contract or pledge, as he has not personal information, but submits to the court this question, and calls on the holders of the collateral to disclose all the facts of the transaction. This discovery in case of banks, to be made by the presidents of such banks; the holders of such collateral, the particular collateral, the names and the residences of the holders are as follows:"

(Then follows the list of collateral holders with the amounts of the same respectively held by them.)

"Your petitioner further states and shows that the above-named case, in which this petition or bill is filed, is a general creditor's bill, pending in this court to wind up the affairs of the defendant, Cardiff Coal & Iron Company, as an insolvent corporation, and to administer its assets as a trust fund for the benefit of all its creditors ratably, said company, as stated, being a corporation organized under the laws of Tennessee. For this purpose and to better effectuate this object, your petitioner has been duly appointed receiver of the property and assets of said company by this court, and he has qualified and entered upon his duties as such under the general directions common in such cases.

"Your petitioner, upon examination, ascertained the debtors were very numerous, as will be seen, and that the debts could only be collected by suit, and that the expense of separate suits would result in such an unnecessary and enormous loss of the assets, and that such course would also, for obvious reasons, be almost impracticable and endless. In this situation your petitioner applied to this honorable court for specific instructions as to his right and duty in the matter, and an order has been duly made by this court directing this suit as brought. Said application for instructions and the order thereon are on file in the case and referred to.

"All, or nearly all, of said notes provide for attorneys' fees in case of suit thereon, and petitioner is advised he has the right to recover the same in this suit for the purpose of paying the same

"Premises considered, let those named as defendants hereto be made such by process according to the practice of the court against the defendants residing in the State and as to the non-residents on whom process cannot be served, let an order be made pursuant to the act of Congress (18 Statutes at Large, 472) directing such defendants to appear on a day to be fixed in the order, and plead, answer or demur, and let such order be served upon such non-resident defendants, wherever found, or in case such service of order cannot be had, let publication be made as the court may direct as to any one or more of such defendants who cannot be so served.

"On the hearing let petitioner have decree against each and every one of the defendants for the amounts so due from each with all proper interest and reasonable attorneys' fees, to be ascertained by reference if necessary. Let the parcels of land on which liens exist for balance of purchase-money, as shown herein, be sold on time in bar of the equity of redemption, for the satisfaction of such decrees, and let them have execution for any balance not so satisfied. Let decree be made against the other defendants named who are indebted to said Cardiff Coal and Iron Company.

"Let the proceeds arising from any of said notes held as collateral be applied in satisfaction of any debt for which the court may hold that they are legally and validly held, and let the surplus be paid over and go into the general assets for creditors.

"Finally, grant all such orders and decrees, special and general, as will fully effectuate the objects of this bill as well as all proper and general relief upon the facts of the case."

Subpœna was issued and served on the resident defendants, and an order of publication made against those non-resident lot-purchasing defendants whose notes were a lien on their lots. No exception was taken to the form of the bill by demurrer or otherwise. The defendants nearly all answered, denying their liability. The cause was referred to a master, and on his report decrees were entered against those found to be indebted. The decrees against individual defendants were, in a majority of instances, for sums less than $2,000.00. The lots were ordered sold to pay the amounts so found due. Appeals from these decrees were duly taken and perfected by the defendants.

5 Because we find difficulty in reaching a conclusion on the question, and because it is of a class of questions which Congress has provided may be examined on direct appeal to the Supreme Court, it is ordered that, upon the foregoing statement of facts, the following question, concerning which this court requests the instruction of the Supreme Court of the United States for its proper decision, be certified to that court in accordance with section 6 of the act to establish circuit courts of appeals approved March 3d, 1891.

Question. Had the circuit court of the United States in a general creditor's suit properly pending therein for the collection, administration and distribution of the assets of an insolvent corporation, the jurisdiction to hear and determine an ancillary suit instituted in the same cause by its receiver in accordance with its order against debtors of such corporation, so far as in said suit, the receiver claimed the right to recover from any one debtor a sum not exceeding $2,000.00?

It is further ordered that the consideration of all other questions in this cause be stayed until the action of the Supreme Court upon the foregoing certificate be certified to this court.

Feb'y 8th, 1895.

W. H. TAFT,
HORACE H. LURTON,
H. F. SEVERENS,
Sitting as Judges in the Circuit Court of Appeals for the Sixth Circuit.

6 THE UNITED STATES OF AMERICA, } ss:
For the Sixth Circuit, }

I, Frank O. Loveland, clerk of the United States circuit court of appeals for the sixth circuit, do hereby certify that the foregoing certificate in the case of J. H. White *et al. vs.* Boyd Ewing, receiver, etc., was duly filed and entered of record in my office by order of said court, and as directed by said court the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Cincinnati, this 11th day of February, A. D. 1895.

Seal United States Circuit Court of Appeals, Sixth Circuit.

FRANK O. LOVELAND,
Clerk of U. S. Circuit Court of Appeals for the Sixth Circuit.

Endorsed on cover: Case No. 15,797. U. S. circuit court of appeals, sixth circuit. Term No., 913. J. H. White *et al.*, appellants, *vs.* Boyd Ewing, receiver of the Cardiff Coal and Iron Company. Filed February 15th, 1895.

FILED.
MAY 6 1895
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1894

J. H. WHITE *et al.*, Appellants,

vs.

BOYD EWING, Receiver of the Cardiff Coal and Iron Co.

No. 913.

Motion to Advance and Submit Under Rule 32.

Now come the appellants and inform this honorable court that this cause comes here upon a matter of jurisdiction upon a certificate from the United States Circuit Court of Appeals for the Sixth District, and presents a question as to whether the appellee has the right to recover in the Circuit Court of the United States from any of the appellants a sum not exceeding two thousand dollars, and the appellants move the court to advance this cause, and ask leave to submit the same upon printed briefs, under Rule 32.

HEBER J. MAY,
TULLY R. CORNICK,
Attorneys for Appellants.

To FOSTER V. BROWN, FRANK SPURLOCK, ROBERT PRITCHARD, J. B. SIZER, *Attorneys for Appellees:*

Take notice that on Monday, the 6th day of May, 1895, at 12 o'clock M., or as soon thereafter as the court can conveniently hear the same, we will call up the above motion and ask its consideration by the court.

HEBER J. MAY,
TULLY R. CORNICK,
Attorneys for Appellants.

Dated this 18th day of April, 1895.

Service of this notice acknowledged; and it is agreed that this motion may be called up for action at the time fixed. This April 18, 1895.

FOSTER V. BROWN,
FRANK SPURLOCK,
Attorneys for Boyd Ewing, Receiver, and for Cardiff Coal and Iron Co.

ROBERT PRITCHARD,
J. B. SIZER,
Attorneys for Boyd Ewing, Receiver Cardiff Coal and Iron Co.

JAMES

Supreme Court of the United States.

OCTOBER TERM, 1894.

J. H. WHITE et al., Appellants,

vs.

BOYD EWING, Receiver of Cardiff Coal and Iron Company.

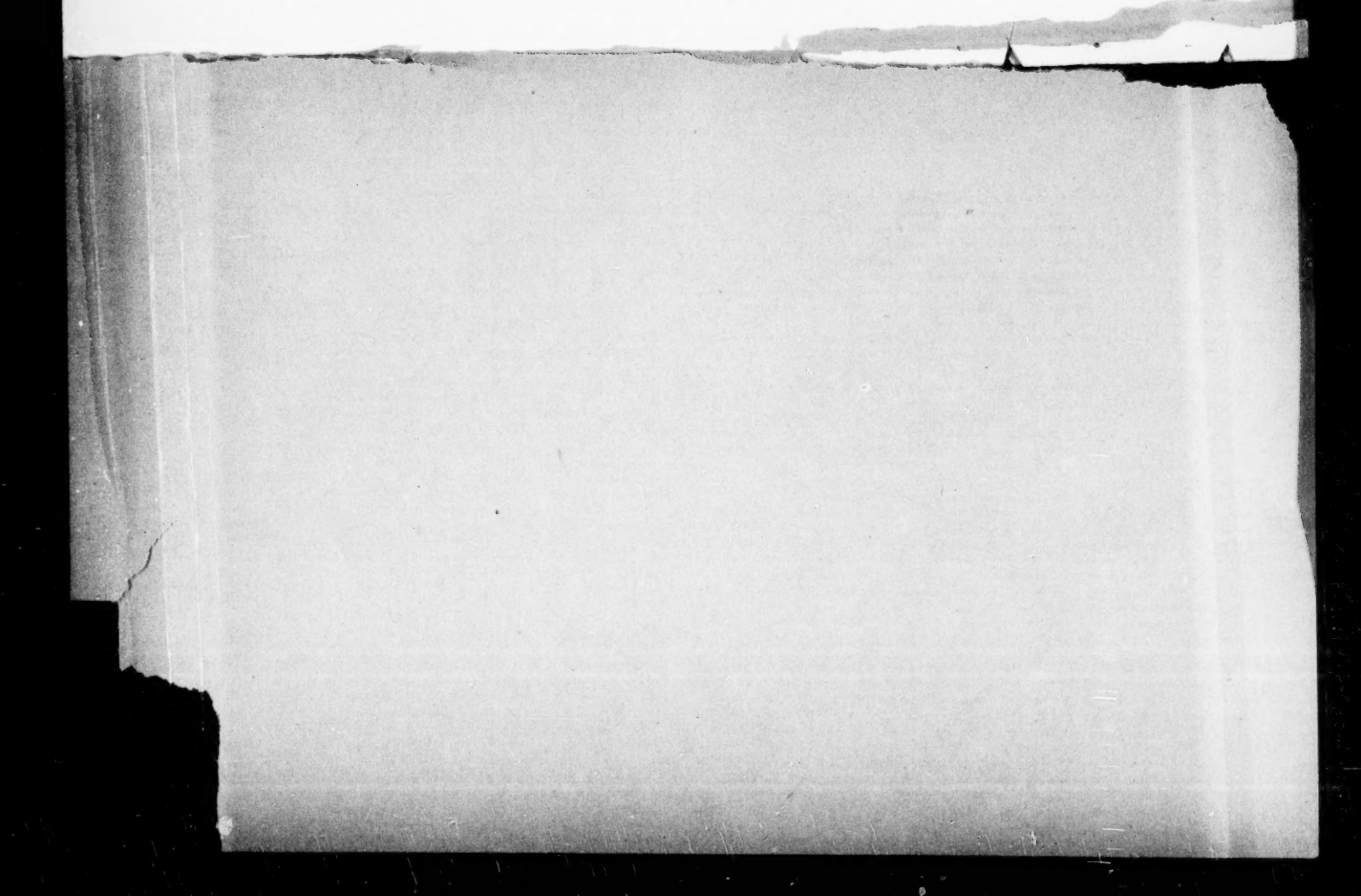
No. 913.

On a Certificate from the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF ON BEHALF OF APPELLANTS

HEBER J. MAY,
JOHN W. YOE,
JOHN F. McNUTT,
TULLY R. CORNICK,
Attorneys for Appellants.

McGILL & WALLACE, Law Printers, Washington, D. C.



Supreme Court of the United States.

OCTOBER TERM, 1894.

J. H. WHITE *et al.*, Appellants,

vs.

BOYD EWING, Receiver of Cardiff Coal and Iron Company.

No. 913.

On a Certificate from the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF ON BEHALF OF APPELLANTS.

This cause comes to this court upon a certificate of the judges, which contains a statement of the facts, which may be briefly presented as follows:

The Cardiff Coal and Iron Company, a corporation of Tennessee, became insolvent, and a creditor's bill was filed in the Circuit Court of the United States for the Southern Division of the Eastern District of Tennessee, setting forth the insolvency of the company, the wasting of its assets, etc., praying for the sale of the property, the collection of its choses in action, for the appointment of a receiver, and for an injunction. A receiver was appointed, who was given the powers usual in such cases. (Rec., 1.)

Subsequently, Boyd Ewing, who was appointed such receiver, filed a petition in the Circuit Court, stating, among other things, upon information and belief, that it would be necessary to bring a suit, or suits, to collect promissory notes due said company amounting to about the sum of $225,000, which were given for land purchased from said company, and upon which liens had been retained to secure the payment of the same, and the receiver petitioned for specific authority and directions from the court to institute suit for the collection of such promissory notes. The receiver in his petition stated also that he was advised and informed that in order to save costs and expense of many suits, it was proper, if the same might be done, to bring in all the debtors by bill or petition and join them as defendants in one suit, and that he was requested by the creditors to proceed in this manner; that to sue the debtors separately would require more than one hundred suits with the enormous expense incident thereto. (Rec., 1, 2.)

In response to the petition of the receiver the court made the following order concerning the bringing of said suit, to wit:

"Upon application by the foregoing petition the receiver in this case is ordered and directed to institute suit by proper bill or petition in the pending case against all persons indebted to the defendant company (The Cardiff Coal and Iron Co.) by note or account, as set forth in his petition. Such suit may be brought without any additional bond to that already given for costs of the principal cause." (Rec., 2.)

In pursuance of the order of the court the receiver filed his bill in the Circuit Court against one hundred and thirty persons, of whom thirty were alleged to be citizens of Tennessee and the remainder citizens of other States, all of whom were joined as defendants in such suit, and the amounts alleged to be due from these de-

fendants respectively were in most cases less than two thousand dollars ($2,000). It is also alleged that special liens were retained in each case in the deed to each purchaser to secure the deferred payments of purchase money, and the court was asked to enforce such liens by the sale of the lots for the satisfaction of the balances of purchase money due separately from each and all of said defendants upon their respective notes. (Rec., 3.)

The receiver in his petition alleges his authority for bringing the suit against the numerous defendants as follows:

"Your petitioner, upon examination, ascertained the debtors were very numerous, as will be seen, and that the debts could only be collected by suit, and that the expense of separate suits would result in such an unnecessary and enormous loss of the assets, and that such course would also, for obvious reasons, be almost impracticable and endless. In this situation your petitioner applied to this honorable court for specific instructions as to his right and duty in the matter, and an order has been duly made by this court directing this suit as brought. Said application for instructions and the order thereon are on file in the case and referred to." (Rec., 4.)

The resident defendants were personally served with subpœna, and an order of publication made against the non-resident, lot-purchasing defendants whose notes were a lien on their lots. No exception was taken to the form of the bill, by demurrer or otherwise, and the defendants nearly all answered denying their liability. The cause was referred to a master, and on his report decrees were entered against those found to be indebted, and such decrees, as above stated, against individual defendants, were, in a majority of instances, for sums less than $2,000. The lots were ordered sold to pay the amounts so found due. Appeals from these decrees were duly taken to the United States Circuit Court of Appeals and perfected by the appellants in this case. (Rec., 5.)

The Circuit Court of Appeals has certified the question of jurisdiction to this court for determination upon the following statement and question:

"Because we find difficulty in reaching a conclusion on the question, and because it is of a class of questions which Congress has provided may be examined on direct appeal to the Supreme Court, it is ordered that, upon the foregoing statement of facts, the following question, concerning which this court requests the instruction of the Supreme Court of the United States for its proper decision, be certified to that court in accordance with section 6 of the act to establish circuit courts of appeals, approved March 3, 1891.

"Question. Had the Circuit Court of the United States in a general creditors' suit properly pending therein for the collection, administration and distribution of the assets of an insolvent corporation, the jurisdiction to hear and determine an ancillary suit instituted in the same cause by its receiver in accordance with its order against debtors of such corporation, so far as in said suit the receiver claimed the right to recover from any one debtor a sum not exceeding $2,000?

"It is further ordered that the consideration of all other questions in this cause be stayed until the action of the Supreme Court upon the foregoing certificate be certified to this court." (Rec., 5.)

As to Jurisdictional Amount.

We insist that the court below should have stopped proceedings under the act of 1875, as amended and corrected by the acts of 1887 and 1888 (24 Stat., c. 373, p. 552; 25 Stat., c. 866, p. 434), because of the want of jurisdictional amounts. We concede that where an insolvent corporation is placed in the hands of a receiver at the suit of a judgment creditor in the United States Circuit Court that that draws to the jurisdiction of the court control of its assets, so far as persons having claims to participate in the distribution of the assets are

concerned, and that parties must go into that court in order to assert their rights, prove their demands, and receive whatever may be due them or their share or interest in the estate. But that is not this case. The defendants, the lot purchasers in this case, have not been brought before the court for the purpose of the payment to them of the claims which they hold against the estate, but to recover of them claims which the receiver insists they owe the estate.

The Cardiff Coal and Iron Company, as a corporation, could not have sued 136 defendants in one suit on sums less than $2,000, as has been done by the receiver. The receiver stands in the shoes of the Cardiff Coal and Iron Company, and has no higher rights than the corporation, and, having sued for less than the jurisdictional amounts, we insist that this case must be dismissed. (High on Receivers, 3d ed., 1894, secs. 204–5 and 248.)

The fact that no demurrer was interposed for multifariousness can have no effect in this case, as we insist, because the act of 1875 is mandatory upon the court that it shall stop proceedings whenever it appears that the court has not proper jurisdiction.

A judgment can be impeached collaterally if the court rendering it was wholly without jurisdiction.

Moore v. *Town of Edgefield*, 32 Fed. Rep., 498, and note;
Collins et al. v. *Woodruff*, 9 Ark., 436;
Camp v. *Wood*, 10 Watts (Pa.), 118;
Boswell's Lessee v. *Otis*, 9 How., 336;
Grace v. *Am. Cent. Ins. Co.*, 109 U. S., 278, 283.

We have been unable to find any law that authorizes the Circuit Court to alter or enlarge its jurisdiction by entering such an order as appears of record in this case. Nor have we found any law that confers upon receivers the special privilege or right to sue jointly several de-

fendants upon separate and distinct demands or causes of action by aggregating the amounts due them when less respectively than $2,000, for the purpose of making up the statutory jurisdictional amount. We believe receivers stand upon the same footing in the eyes of the law in this respect as other litigants. And it will not answer the purpose to say the debtors or defendants are numerous, or that great inconvenience will arise from the prosecution of so many suits, or that the expense of separate suits will be large.

In the case of the *New Orleans Pacific Railway* v. *Parker* (143 U. S., 42), involving the jurisdictional amount in appeals to this court, the ruling is clearly made in favor of the contention for the appellants here. After stating in what cases the jurisdiction can be upheld where the amounts collectively under a common title do not exceed $5,000, the court draws the true distinction and excludes from the rule laid down cases "*wherein the matters in dispute are separate and distinct, and are joined in one suit for convenience and economy.*"

This case most assuredly falls within the latter class.

In *Gibson* v. *Shufeldt*, 122 U. S., 27, this court said:

"In a suit in equity brought in the Circuit Court by two or more persons on several and distinct demands, the defendant can appeal to this court as to those plaintiffs only to each of whom more than $5,000 is decreed."

This rule was affirmed and applied in *Henderson* v. *Carbondale Coal and Coke Co.*, 140 U. S., 25.

In *Walter* v. *Northeastern Railroad Co.*, 147 U. S., 370, 373, a case in which the jurisdictional amount in the Circuit Court was directly involved, this court reviewed the decisions upon the question, and held that—

"It is well settled in this court that when two or more plaintiffs, having several interests, unite for the convenience of litigation in a single suit, it can only be sustained

in the court of original jurisdiction, or on appeal in this court, as to those whose claims exceed the jurisdictional amount; *and that when two or more defendants are sued by the same plaintiff in one suit, the test of jurisdiction is the joint or several character of the liability to the plaintiff.*"

And at page 374 the court say:

"In short, the rule applicable to several plaintiffs having separate claims, that each must represent an amount sufficient to give the court jurisdiction, *is equally applicable to several liabilities of different defendants to the same plaintiff.*" (*Stewart* v. *Dunham*, 115 U. S., 61, and many other cases are cited and applied by Mr. Justice Brown in the opinion in this case.)

This rule was affirmed and applied in *Northern Pacific Railroad Company* v. *Walker*, 148 U. S., 391; see also *Moore* v. *Edgefield*, 32 Fed. Rep., 498.

We respectfully submit, therefore, that the Circuit Court had no jurisdiction to render judgments against the appellants where the amounts claimed did not exceed two thousand dollars.

HEBER J. MAY,
JOHN W. YOE,
JOHN F. MCNUTT,
TULLY R. CORNICK,
Attorneys for Appellants.

Office Supreme Court, U. S.
FILED.
MAY 6 1895
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1894.

J. H. WHITE et al., Appellants,

vs.

BOYD EWING, Receiver of Cardiff Coal and Iron Company.

No. 913.

On a Certificate from the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF ON BEHALF OF APPELLEE.

ROBERT PRITCHARD,
FOSTER V. BROWN,
FRANK SPURLOCK,
Solicitors for Appellee.

JAC. GOMAN & COOKE, PRINTERS, CHATTANOOGA.

Supreme Court of the United States

OCTOBER TERM, 1894.

J. H. WHITE *et al.*, Appellants,

vs.

BOYD EWING, Receiver of Cardiff Coal and Iron Company.

No. 913.

On a Certificate from the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR APPELLEE.

Under the original and general creditors bill filed in this case by Geo. F. Bosworth, a judgment creditor of the Cardiff Coal and Iron Company, appellee was appointed receiver of said company and ordered to take possession of all its assets, and to manage and protect the same for the benefit of the creditors under orders of the court. He was further ordered "to ascertain and report to the court what assets the company had, the kind and situation thereof, and any proper steps to be taken in respect thereto; especially any debts or liabilities to the company, and the amount and kind thereof." All creditors were ordered to file their claims.

Subsequently the receiver filed a petition stating that a large portion of the company's assets consisted of promissory notes, amounting to about $225.000, given for land purchased from the company, with vendor's liens retained. These notes were executed by one hundred and thirty different persons, and were for various amounts—many of them for less than $2000. (Rec. 1–2.)

On the filing of this petition the following order was made:

Nashville Tenn., July 11th, 1891.
At Chambers.

Upon application by the foregoing petition, the receiver in this case is ordered and directed to institute suit by proper bill or petition in the pending case against all persons indebted to the defendant company (the Cardiff Coal and Iron Company) by note or account, as set forth in this petition. Such suit may be brought without any additional bond to that already given for costs of the principal cause. * * *

HOWELL E. JACKSON,
Circuit Judge.

Thereupon the receiver filed this bill as directed, against all the the parties who had executed the notes, to enforce the vendor's lien and for personal judgments. Process was issued as to the resident defendants, and publication made for the non-residents, nearly all of whom appeared and answered. (Rec. 3, 4.)

The question certified is: "Had the Circuit Court of the United States in a general creditors suit properly pending therein for the collection, administration and distribution of the assets of an insolvent corporation, the jurisdiction to hear and determine an ancillary suit instituted in the same cause by its

receiver in accordance with its order against debtors of such corporation, so far as in said suit the receiver claimed the right to recover from any one debtor a sum not exceeding $2000?"

We admit that the Circuit Court of the United States can only take *original cognizance* of suits where the matter in dispute exceeds, exclusive of interest and cost, the sum or value of $2000, and that *in such cases*, where several parties are sued jointly for the sake of convenience, if the matters in dispute are separate and distinct as to each defendant, there must exist as to each the requisite jurisdictional amount.

Such are all the cases cited in brief on behalf of appellant.

But the question certified is: Do these rules as to jurisdictional amount, deny the jurisdiction of the Circuit Courts of the United States to hear and determine an ancillary suit instituted by a receiver in, and as a part of, a cause of which the court has previously acquired jurisdiction?

The receiver in this case was appointed at the instance of a judgment creditor suing for himself and all other creditors of an insolvent corporation. The jurisdiction of equity in such case is to aid and supplement the creditor's legal remedies.

"The fundamental principle upon which it rests is the inadequacy of the legal remedy, and the consequent necessity for the aid of equity to supplement the remedy at law."

High on Receivers, Sec. 399.

"In regard to suits in the Federal court, a receiv-

er appointed by a Federal court may bring all his suits in that court on the ground of their being *auxiliary to the suit in which he was appointed.*"

Cook on Stock and Stockholders, Sec. 869.

Dewey vs. Coal Co., 123 U. S. 329.

Morgan's Co. vs. Tex. Central Ry. 137 U. S., 171, 202.

It has been expressly and repeatedly held that the auxiliary or dependent character of such litigation dispenses with the diversity of citizenship necessary in original suits:

Freeman vs. Howe, 24 How. 450.

Krippendorf vs. Hyde, 110 U. S. 280.

We perceive no reason why the rule should be different as to the jurisdictional amount, but on the contrary insist that it is the same, otherwise the Federal courts would be lacking in essential jurisdiction as the means of administering the assets of insolvents. While these courts in appointing receivers take into their possession all the assets of the judgment debtor, and assume their administration, they would be powerless to collect them in unless they consisted of demands exceeding $2000.

If, as in this case, most of the assets consist of notes for less than $2000, the Federal court, to make a proper administration must appeal to the aid of the State courts.

In Porter vs. Sabin, 149 U. S. 479, Mr. Justice Gray said:

"When a court exercising jurisdiction in equity

appoints a receiver of all the property of a corporation, the court assumes the administration of the estate; the possession of the receiver is the possession of the court; and the court itself holds and administers the estate through the receiver as its officer, for the benefit of those whom the court shall ultimately adjudge to be entitled to it."

And further on, in speaking of the relative rights of the State and Federal courts, it is said:

"Until the administration of the estate has been completed, and the receivership terminated, no court of the one government can by collateral suit assume to deal with rights of property or of action, constituting part of the estate within the exclusive jurisdiction and control of the other."

Krippendorf vs. Hyde, 110 U. S., 276, was a bill filed in an attachment suit by the claimant of the property attached to prevent the distribution among the attaching creditors of the funds arising from the sale of the property.

It was held by the court that the plaintiff was deprived of his remedy at law in the State court, because the property attached, being in the hands of the Marshal, was regarded as in the custody of the Federal court, and that being an auxiliary proceeding it could be maintained without respect to the citizenship of the parties.

After stating the right of third persons to intervene the court says:

"The same practice prevails in cases where the property is put into the hands of a receiver. The grounds of this procedure are the duty of the court to prevent its process from being abused to the injury of third persons, and to protect its officers and its own custody of property in their possession, so as to de-

fend and preserve its jurisdiction, for no one is allowed to question or disturb that possession except by leave of the court."

The bill in this case was filed against all attaching creditors, a large number of whom had established claims in the original suit of less than the jurisdictional amount, which fact was noticed by the court, page 284.

In Bank vs. Turnbull & Co., 16 Wallace, 190, the proceeding was one to try the rights to property levied on by execution. It was held that no other court than the one rendering the judgment could properly determine whether the property should be applied. It was so held because the proceeding was ancillary to the original suit, and to protect the jurisdiction of the court rendering the judgment.

The same principle is established by Barrow vs. Hunton, 99 U. S., 80.

In New Orleans vs. Benjamin, 153 U. S., 430, it is said that under the jurisprudence prevailing in Louisiana where a creditor may exercise the right of action of the debtor, this right is analogous to the garnishee or trustee process in some states.

In the case at bar the rights of action of the debtor, the Cardiff Coal and Iron Company, were by order of the court under the general creditors' bill expressly vested in the receiver, and he was directed to sue for the benefit of the creditors in that suit. The suit brought under this order is not only analogous, but the same in affect as a garnishment proceeding. The object of such process is to subject property to the

satisfaction of judgments, or in aid of pending suits, and it has never been considered that it could only run against property or to enforce rights of action equal to the jurisdictional amount requisite in the original case. Such limitation on the garnishee process would practically defeat its object, and in many cases require courts of smaller jurisdiction to aid the court rendering the judgment or having the original jurisdiction in securing the appropriation of the debtor's property.

In cases decided at circuit it has been held that the cases of Bank vs. Turnbull, and Barrow vs. Hunton are analogous upon principle to garnishment proceedings. And the analogy to such proceedings is applied to all ancillary process in aid of judgments, or pending suits, and without reference to the amount sought to be reached and appropriated.

Pratt vs. Albright, 9 Fed. R., 634, 638.

Poole vs. Thacherdeft, 19 Fed. R. 49.

Burford vs. Strother, 10 Fed. Rep. 406, was decided on motion to remand a garnishee proceeding. The court stated that the controlling principle was this:

"Where the supplemental proceeding is in its character a mere mode of execution or of relief, inseparably connected with the original judgment or decree, it cannot be removed, notwithstanding the fact that some new controversy or issue between the plaintiff in the original action and a new party may arise out of the proceeding.

Every court must, in the nature of things, have the right, as well as the power, to carry its own judgments into execution. To take from any court the

prerogative of executing its own judgments by proper process or by supplemental proceedings, when necessary, would be to cripple its jurisdiction in a most essential manner."

It was also held that a special proceeding, to appriate the assets of a corporation to a judgment upon a return of *nulla bona*, was manifestly but a mode of execution and within the rules stated. In this case, and in the case of Poole vs. Thatcherdeft, *supra*, the embarrassment is pointed out that must arise from attempts to separate the ancillary from the original suit.

The bill or petition now in question is based on an order similar to that made in the case of Davis vs. Gray, 16 Wal., 203. It is ancillary "in the sense which this court has sanctioned, with reference to the line which divides the jurisdiction of the Federal courts from the State courts."

Krippendorf vs. Hyde, 110 U. S., 285.

In such case the entire assets of the corporation are brought into court for administration, and are, therefore, the matters in dispute or controversy.

Towle vs. Am. Bldg. & L. Soc., 60 F. R. 134.

In conclusion, we insist that to effectuate the jurisdiction properly assumed in the original suit, the question certified should be answered in the affirmative.

ROBERT PRITCHARD,
FOSTER V. BROWN,
FRANK SPURLOCK,
Solicitors for Appellee.

Office Supreme Court, U. S.
FILED.
MAY 10 1895
JAMES H. McKENNEY,
Clerk

Supreme Court of the United States

OCTOBER TERM, 1894.

J. H. WHITE *et al.*, Appellants,
vs.
BOYD EWING, Receiver of Cardiff Coal and Iron Company.
No. 913.

AMENDED BRIEF ON BEHALF OF APPELLEE.

We respectfully call attention to a line of decisions on the circuit not cited in original brief on behalf of Appellee. These cases decide the exact question in controversy according to our contention.

Armstrong vs. Trautman, 36 Fed. Rep. 275, and cases therein cited.

ROBERT PRITCHARD,
FRANK SPURLOCK,
FOSTER V. BROWN,
Solicitors for Appellee.

159-40

RECORD, CASE No. 14,923.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., ~~672~~. 341

CHARLES W. HORNE, PLAINTIFF IN ERROR,

vs.

C. A. SMITH AND R. T. SMITH.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

FILED NOVEMBER 2, 1891.

RECORD, CASE No. 14,923.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM NO., 672.

CHARLES W. HORNE, PLAINTIFF IN ERROR,

vs.

C. A. SMITH AND R. T. SMITH.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 11, 1893.

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1 Pleas in the circuit court of the United States, fifth judicial circuit, in and for the northern district of Florida, in a certain cause therein wherein Charles W. Horne is plaintiff and Charles A. Smith and Robert T. Smith are defendants.

Be it remembered that on the 27th day of September, A. D. 1890, came Charles W. Horne, plaintiff in the case aforesaid, by H. Bisbee, his attorney, and filed in the clerk's office of the circuit court aforesaid his precipe for a *summons ad respondendum* in the words and figures following, to wit:

In the Circuit Court of the United States for the Northern District of Florida.

CHARLES W. HORNE, a Citizen of the State of Ohio,)
vs.
C. A. SMITH and R. F. SMITH, Citizens of the State of Florida.)

The clerk of said court will please issue *summons ad respondendum* directing the marshal of said district to summon C. A. Smith and R. T. Smith to answer to Charles W. Horne in an action of ejectment returnable to the rule day in November, A. D. 1890. Plaintiff claims $5,000.00 as mean profits. The land sought to be recovered is described as follows, to wit:

Lot seven (7), section twenty-three (23) (except thirty (30) acres on north side previously conveyed), and lots one (1) and two (2), section twenty-six (26), township twenty-nine (29) south, of range thirty-eight (38) east, on the Indian river, according to the official plat of the survey of said land returned to the General Land
2 Office by the surveyor general.

The foregoing description to be endorsed on the back of said summons.

H. BISBEE,
Attorney for Plaintiff.

(Indorsed:) In the circuit court of the United States, northern district of Florida. Charles W. Horne *vs.* C. A. Smith and R. T. Smith. Precipe for summons. Filed the 27th day of September, 1890. Philip Walter, clerk.

Whereupon a *summons ad respondendum* issued from the clerk's office aforesaid, which, with the return and endorsements thereon, is in the words and figures following:

United States Circuit Court, Fifth Circuit, Northern District of Fla.

The President of the United States to the marshal of the northern district of Florida, Greeting:

You are hereby commanded to summon C. A. Smith and R. T. Smith, if they may be found in your district, to be and appear before the circuit court of the United States, fifth circuit and north-

ern district of Florida, at the rule day of said court, to be held at the clerk's office, in the city of Jacksonville, on the first Monday of November next, to answer unto Charles W. Horne in said court on a plea of ejectment wherein the plaintiff claims damages to the amount of five thousand dollars, and have you there and then this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of the court of the city of Jacksonville, in said district, this 29th day of September, A. D. 1890.

[SEAL.]

PHILIP WALTER, *Clerk.*

3 H. BISBEE,
Plaintiff's Attorney.

(Indorsed.)

The land claimed by plaintiff is described as follows:

Lot seven (7), section twenty-three (23) (except thirty (30) acres on the north side previously conveyed), and lots one (1) and two (2), section twenty-six (26), township twenty-nine (29) south, of range thirty-eight (38) east, on Indian river, according to the official plat of the survey of said land returned to the General Land Office by the surveyor general.

Received this writ on the 29th day of September, 1890, and served the same by delivering true copies of the same to the within-named defendants, C. A. Smith and R. T. Smith, and at the same time showing them the original, within the northern district of Florida, on the 2nd day of October, 1890.

JOHN R. MIZELL,
U. S. Marshal.
By ROY P. MOODY, *Deputy.*

United States circuit court, northern district of Florida. Charles W. Horne *vs.* C. A. Smith and R. T. Smith. Summons. Issued Sept. 29, 1890. Returnable November 3rd, 1890. Ret. and filed October 6th, 1890. Philip Walter, clerk. H. Bisbee, plaintiff's attorney.

And afterwards, to wit, on the 3rd day of November, 1890, the plaintiff, by his attorney, filed in the clerk's office aforesaid his declaration in the words and figures following, to wit:

In the Circuit Court of the United States, Northern District of Florida.

CHARLES W. HORNE)
vs.
C. A. SMITH and R. T. SMITH.)

4 Charles W. Horne, a citizen of the State of Ohio, by H. Bisbee, his attorney, complains of C. A. Smith and R. T. Smith, citizens of the State of Florida, who have been summoned to

answer him in an action of ejectment, for that whereas the defendants are in possession of a certain tract or parcel of land, situate, lying, and being in the county of Brevard, State of Florida, known and described as follows, to wit: Lot seven (7), section twenty-three (23) (excepting thirty (30) acres on the north side previously conveyed), and lots one (1) and two (2), section twenty-six (26), township twenty-nine (29) south, and range thirty-eight (38) east, on Indian river, according to the official plat of the survey of said land returned to the General Land Office by the surveyor general, containing about 140 acres, to which said plaintiff claims title; and the defendants have received the profits of said land since the 1st day of January, 1887, of the yearly value of $1,200, and refuse to deliver the possession of said lands to the said plaintiff or to pay him the profits thereof.

Wherefore the plaintiff brings suit.

H. BISBEE,
Attorney for Pl'ff.

(Indorsed:) In the circuit court of the United States, northern district of Florida. Charles W. Horne *vs.* C. A. Smith and R. T. Smith. Declaration. Filed November 3rd, 1890. Philip Walter, clerk. H. Bisbee, attorney for plaintiff.

5 And upon the same day, to wit, on the third day of November, 1890, the defendants, by their attorney, entered their appearance herein.

And afterwards, to wit, on the 1st day of December, 1890, the said defendants, by their attorneys, filed in the clerk's office aforesaid their plea in the words and figures following:

In the Circuit Court of the United States, Fifth Judicial Circuit and Northern District of Florida.

CHARLES W. HORNE *vs.* C. A. SMITH & R. T. SMITH.	Common Law. In Ejectment. Pleas.

And now come the defendants, by their attorney, and for plea to plaintiff's declaration herein filed say:

1st. That they are not in possession of lot 7, section 23 (except 30 acres on the north side previously conveyed), and lots one (1) and two (2), section 26, township 29 south, and range 38 east, on Indian river, according to the official plat of the survey of said lands returned to the General Land Office by the surveyor general.

ROBBINS & GRAHAM AND
D. L. GAULDEN,
Attorneys for Defendants.

Before me came C. A. Smith and made oath that the foregoing plea is true in substance and in fact.

D. L. GAULDEN,
Notary Public.

[SEAL.]

6 And afterwards, to wit, on the 14th day of January, 1891, at a term of the circuit court of the United States, held in and for the northern district of Florida, at the court-house room, in the city of Jacksonville, came the said plaintiff and the said defendants, by their respective attorneys, and thereupon came a jury, to wit, C. O. Livingston and eleven others, who, being duly elected, tried, and sworn the truth to speak, upon the issues joined, having heard the evidence, the charge of the court, and having considered of their verdict, upon their oaths do say:

"We, the jury, find for the defendants."

C. O. LIVINGSTON, *Foreman.*

And afterwards, to wit, on the 30th day of June, 1891, the judgment of the circuit court upon said verdict was entered in the words and figures following, to wit:

CHARLES W. HORNE }
vs. }
C. A. SMITH & R. T. SMITH. }

A verdict for defendants having been rendered in this cause on the 14th day of January, 1891, it is therefore considered by the court that the said defendants, C. A. Smith and R. T. Smith, go hence without —, and that they do have and recover of and from the plaintiff, Charles W. Horne, their costs herein expended, now here taxed at $—.

7 In the Supreme Court of the United States.

CHARLES W. HORNE, Plaintiff in Error, }
vs. } Assignment of Errors.
C. A. SMITH and R. T. SMITH, Defendants in Error. }

Comes now the plaintiff in error, by H. Bisbee, his attorney, and says that there is manifest error in the record and proceedings in the above-entitled cause and assigns for error the following grounds, to wit:

I.

That the court erred in admitting any testimony to prove that the official plat of the survey of the lands in controversy was incorrect, it being the official plat according to which the lands in controversy were sold and patented by the United States to U. P. Tyler, and it still being the plat recognized as official by the General Land Office and according to which all sales of land in that township had been made.

II.

That the court erred in admitting the testimony of the defendant C. A. Smith, which was, in substance, that there was and is a large tract of good, arable land lying between the lands of the plaintiff and the waters of the Indian river, which land is unsurveyed Gov-

ernment land; that said tract of land lay adjoining the land of the plaintiff and to the west of it, and that plaintiff's land and this unsurveyed land were separated by a savannah or bayou.

Plaintiff in error contends that as the official plat of the survey of the township in which the land in controversy lies shows
8 that plaintiff's lots are bounded on the west by the Indian river, and that there is no unsurveyed land between plaintiff's west boundary and said river, and that plat being in evidence in the case and referred to in the patent, that the court erred in admitting the testimony of the said defendant to contradict the facts as set forth on the plat.

III.

That the court erred in refusing plaintiff's request that the following charge be given to the jury:

"The certified copy of the official map or plat of the lands made and adopted by the Government of the United States and in evidence in this case is as much a part of the patent, also in evidence, as if it had been copied into and made a part of the patent itself. This plat shows that the western boundary of the lots in question in this action is the waters of the Indian river, in accordance with the acts of Congress which require the lines of lots or fractions of a section on navigable rivers where surveyed to run to the waters of the river.

Purchasers of the land from the United States buy and the Government sells public lands according to the official maps or plats made by its own officers and kept in its land offices for inspection to show, among other purposes, to purchasers the location of any given piece of land and its boundaries.

The court instructs you that the plat in evidence in this case, made by officers whose duties require them to make correct surveys and correct plats of all lands of the Government, is presumed to be correct, and it is your duty to be governed by it in making up your verdict."

9 IV.

That the court erred in refusing to instruct the jury as requested by plaintiff in error as follows:

"It is not within your power to disregard the survey of these lots as made by the Government and shown by the plat in evidence. If the survey is not correct the executive department of the Government may perhaps correct it by a new survey, and if the patent in evidence conveyed more land to the patentee than the Government has received pay for that department can pursue such remedy as the laws give; but this court and jury have no power or authority to deprive the plaintiff of any lands within the boundaries of the lots in question, as shown by the official plat in evidence, even though a less quantity of land has been paid for than is included in such boundaries."

V.

That the court erred in instructing the jury as follows:

"That it is the rule that the meander line is not the boundary line—they are run not as boundaries of the tract, but for the purpose of finding the sinuosities of the bank of the stream.

Fractional divisions, made so by the water, are designated and sold by the numbers attached to, and reference is always had to the notes and maps of the survey. The water in the notes is the boundary, and when there exists a difference between the meander line as run and the actual margin of the stream or lake the water is the true boundary; but this rule has its limitations, as, for instance, a case in Polk county with which I am familiar, where there is fifteen miles intervening between the meander line and the margin of a lake. This breaks the rule, and I charge you that when, as in this case, there is from three-fourths of a mile to a mile and a quarter between the meander line and the actual margin of the river, and when for half a mile in width this land has oak trees on it from three to four feet in diameter, especially where the waters make up, forming a bayou which conforms substantially to the meander line of the Government survey, this is not within the rule."

Wherefore the said plaintiff in error prays that the judgement of the said circuit court of the United States for the northern district of Florida be reversed, and that the said court be ordered to grant a new trial of said cause.

H. BISBEE,
Attorney for Plaintiff in Error.

[Endorsed:] In the Supreme Court of the United States. Charles W. Horne, plaintiff in error, *vs.* C. A. Smith and R. T. Smith, defendants in error. Assignment of errors. H. Bisbee, attorney for plaintiff in error.

In the Circuit Court of the United States, Fifth Judicial Circuit, in and for the Northern District of Florida, December Term, A. D. 1890.

Be it remembered that at a term of the circuit court of the United States, fifth judicial circuit, in and for the northern district of Florida, held at Jacksonville on the 1st day of December, A. D. 1890, a cause therein pending, wherein Charles W. Horne was plaintiff and C. A. Smith and R. T. Smith were defendants, came on to be heard before the Honorable Charles Swayne, a judge of said circuit court, at which day came the said parties by their respective attorneys.

And thereupon the said issues in manner aforesaid joined between the said parties came on to be tried, and the jurors of the jury aforesaid, whereof mention is within made, being called, likewise came and were sworn to try the said issues in manner aforesaid joined, and thereupon the plaintiff, to maintain the issues on his part, produced and offered in evidence a certain deed of conveyance from

George F. Ensey and wife to Charles W. Horne, dated April 10th, A. D. 1886, in words and figures as follows:

This indenture made the 10th day of April in the year of our Lord one thousand eight hundred and eighty-six, between George F. Ensey and his wife Minnie E. Ensey of the county of Brevard and State of Florida, of the first part, and Charles W. Horne of Cincinnati, State of Ohio of the second part, witnesseth,

That the said parties of the first part for and in consideration of the sum of two thousand five hundred dollars (2,500.00) lawful money of the United States of America, to them in hand
13 paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged have granted, bargained, sold aliened, remised, released, conveyed and confirmed, and by these presents do grant, bargain, sell, alien, remise, release, convey and confirm unto the said party of the second part and his heirs and assigns forever, all that tract or parcel of land lying and being in the county of Brevard and State of Florida, described as follows, to wit: Lot number seven (7) section twenty-three (23) and lots one and two (1 & 2) section twenty-six (26) in township twenty-nine (29) south of range thirty-eight (38) east, containing one hundred and seventy and forty-two hundredths (170.42) acres, the same being land sold to U. P. Tyler at Gainesville September 8, 1883, except thirty (30) acres off of the extreme north end of the tract, said thirty acres running from the river back to the section line.

Together with all and singular the rights and interest tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and also all the estate, right, title interest, dower and right of dower, separate estate, property possession claim and demand whatsoever, as well in law as in equity, of the said parties of the first part, of, in and to the same, and every part and parcel thereof with the appurtenances; to have and to hold the above granted, bargained and described premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, to his own proper use, benefit and behoof forever.

And the said parties of the first part George F. Ensey and his wife, for themselves, heirs executors and administrators, do covenant, promise and agree to and with the said party of the
14 second part, his heirs and assigns that the said parties of the first part George F. Ensey and his wife, at the time of the sealing and delivery of these presents are lawfully seized in fee simple of a good, absolute and undefeasible estate of inheritance, of and in all and singular the above granted, bargained and described premises, with the appurtenances thereunto, and have good right, full power, and lawful authority to grant, bargain, sell and convey the same in manner and form aforesaid. And that the said party of the second part his heirs and assigns, shall and may at all times hereafter, peaceably and quietly have, hold, use, occupy, possess and

enjoy the above-granted premises, and every part and parcel thereof, with the appurtenances, without any let, suit, trouble molestation, eviction or disturbance of the said parties of the first part their heirs or assigns or of any other person or persons lawfully claiming or to claim the same. And that the same are now free, clear, discharged, and unincumbered of and from all former and other grants, titles, charges, estates, judgments, taxes, assessments and incumbrances of what nature and kind soever.

And the said parties of the first part for themselves and their heirs, the above-described and hereby granted and released premises, and every part and parcel thereof, with the appurtenances, unto the said party of the second part his heirs and assigns, against the said parties of the first part, and their heirs and against all and every person or persons whomsoever, lawfully claiming or to claim the same, shall and will warrant, and by these presents forever defend.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

GEORGE F. ENSEY. [SEAL.]
MINNIE E. ENSEY. [SEAL.]

Signed, sealed, and delivered in presence of us—
JOSEPH P. BLAKE.
A. A. STEWART.

15 STATE OF FLORIDA, }
County of Brevard. }

Know all men by these presents that I, Minnie E. Ensey, wife of the above-named George F. Ensey, do by these presents made and executed by me, separate and apart from my said husband and in the presence of A. A. Stewart, a clerk of the circuit court of the State of Florida, acknowledge and declare that I did make myself a party to and executed the foregoing deed of conveyance for the purpose of conveying all my interest and dower in and to the lands of said conveyance therein described and granted, and that I did the same freely and voluntarily and without any compulsion, constraint, apprehension, or fear of my said husband.

In witness whereof I hereunto subscribe my name and affix my seal this 10th day of April, A. D. one thousand eight hundred and eighty-six.

MINNIE E. ENSEY. [SEAL.]

JOSEPH P. BLAKE.

STATE OF FLORIDA, }
County of Brevard. }

To all whom it may concern:

Be it known that on this 10th day of April, A. D. 1886, personally appeared before me, a clerk of the circuit court of the State of Florida, the above-named Minnie E. Ensey, to me well known as the wife of George F. Ensey and as one of the persons described in and who

executed the foregoing deed of conveyance, who being at the time separate and apart from her husband, the said Minnie E. Ensey did then and there make and execute the foregoing acknowledgement, her name being with her own hand subscribed and her seal affixed in my presence.

16 Witness my hand and seal, at Titusville, Florida, the day and year above written.

[Seal of Court.]

A. A. STEWART,
Clerk of Circuit Court.

STATE OF FLORIDA, }
County of Brevard. }

On this day personally appeared before me George F. Ensey, to me well known as the person described in and who executed the foregoing deed of conveyance, and acknowledged that he executed the same for the purpose therein expressed. Whereupon it is prayed that the same may be recorded.

In witness whereof I have hereunto affixed my hand and seal this 10th day of April, A. D. 1886.

[Seal of Court.]

A. A. STEWART,
Clerk Circuit Court.

STATE OF FLORIDA, }
County of Brevard. }

Be it remembered that on this 17th day of April, A. D. 1886, I, A. A. Stewart, clerk of the circuit court in and for said county, have duly recorded the foregoing deed in the public records of said county.

In witness whereof I have hereunto set my hand and the seal of the said court this day and year above written.

[L. S.] A. A. STEWART, *Clerk.* [SEAL.]

17 And the plaintiff further to prove the issues in his behalf, offered and read in evidence a certain deed of conveyance from U. P. Tyler and wife to George F. Ensey, dated October 17th, 1883, in words and figures as follows:

The indenture made the 17th day of October in the year of our Lord one thousand eight hundred and eighty-three, between Umphrey P. Tyler and his wife Mary A. Tyler of the county of Rock Island and State of Illinois, of the first part, and George F. Ensey of Brevard county, Florida, of the second part, witnesseth:

That the said parties of the first part, for and in consideration of the sum of twenty-five dollars ($25.00) lawful money of the United States of America to them in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained,

sold, aliened, remised, released, conveyed and confirmed, and by these presents do grant, bargain, sell, alien, remise, release, convey and confirm unto the said party of the second part and his heirs and assigns forever, all that tract or parcel of land lying and being in the county of Brevard and State of Florida, and described as follows, to wit:

Lot number seven (7), section twenty-three (23) and lots one and two (1 & 2), section twenty-six (26) east, in township twenty-nine (29) south, of range thirty-eight (38), containing one hundred and seventy and forty-two one-hundredths (170.42) acres, the same being land sold to U. P. Tyler at Gainesville September 8th, 1883.

Together with all and singular the rights and interest tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and also all
18 the estate, right, title, interest, dower and right of dower, separate estate, property, possession, claim and demand whatsoever, as well in law as in equity, of the party of the first part, of, in and to the same, and every part and parcel thereof with the appurtenances; to have and to hold the above granted, bargained and described premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, to his own proper use, benefit and behoof forever.

And the said party of the first part U. P. Tyler, for himself and his heirs, executors and administrators, does covenant, promise and agree to and with the said party of the second part his heirs and assigns, that the said party of the first part Umphrey P. Tyler at the time of the sealing and delivery of these presents *are* lawfully seized in fee simple of a good, absolute, and undefeasible estate of inheritance, of and in, all and singular the above granted, bargained and described premises, and the appurtenances thereunto, and ha*ve* good right, full power and lawful authority to grant, bargain, sell and convey the same in manner and form aforesaid. And that the said party of the second part his heirs and assigns, shall and may at all times hereafter, peaceably and quietly have, hold, use and occupy, possess and enjoy the above-granted premises, and every part and parcel thereof, with the appurtenances, without any let, suit, trouble, molestation, eviction or disturbance of the said party of the first part his heirs or assigns or of any other person or persons lawfully claiming or to claim the same. And that the same are now free, clear, discharged and unincumbered of and from all former and other grants, titles, charges, estates, judgments, taxes, assessments and incumbrances of what nature and kind soever.

And the said party of the first part for him and his heirs
19 the above-described and hereby granted and released premises, and every part and parcel thereof with the appurtenances, unto the said party of the second part, his heirs and assigns, against the said party of the first part and his heirs and against all and every person whomsoever lawfully claiming or to claim the same, shall and will warrant and by these presents forever defend.

In witness whereof, the said party of the first part do hereunto set his hand and seal the day and year first above written.

U. P. TYLER. [SEAL.]
MARY A. TYLER. [SEAL.]

Signed, sealed and delivered in presence of us:
EUGENE LEWIS.
ARTHUR R. ORANGE.

STATE OF ILLINOIS, } ss:
Rock Island County, }

Office of clerk of the county court, Rock Island county, Illinois.

I, Richard A. Donaldson, clerk of the county court in and for said county, do hereby certify that Eugene Lewis, Esq., whose name appears signed to the foregoing certificate, was on the day and date thereof, to wit, on the seventeenth day of October, A. D. 1883, an acting notary public within and for said county, duly commissioned and qualified, and fully authorized and empowered by law to take acknowledgements, administer oaths, and take depositions.

I further certify that the foregoing instrument is executed according to the laws of said State, and, further, that I am acquainted with the handwriting of said notary and believe his signature to the same genuine.

Witness my hand and official seal, at my office, in Rock
20 Island, this the twenty-first day of March, A. D. 1887.

[Clerk Court of Rock Island Co., Illinois. Clerk's Seal.]

RICHARD A. DONALDSON, *Clerk.*

Filed and recorded April 15th, 1887.

A. STEWART, *Clerk.*

This recorded in Deed Book "G," page 608.

STATE OF ILLINOIS, }
County of Rock Island, }

Know all men by these presents that I, Mary A. Tyler, wife of the above-named Umphrey P. Tyler, do by these presents, made and executed by me separate and apart from my said husband and in the presence of Eugene Lewis, a notary public of the State of Illinois, acknowledge and declare that I did make myself a party to and executed the foregoing deed of conveyance for the purpose of conveying all my interest in and to the lands therein described and granted, and that I did the same freely and voluntarily and without any compulsion, constraint, apprehension, or fear of or from my said husband.

In witness whereof I hereunto subscribe my name and affix my seal this seventeenth day of October, A. D. one thousand eight hundred and eighty-three.

MARY A. TYLER. [SEAL.]

STATE OF ILLINOIS, }
County of Rock Island. }

To all whom it may concern:

Be it known that on this 17th day of October, A. D. 1883, personally appeared before me, a notary public of the State of Illinois, the above-named Mary A. Tyler, to me well known as the
21 wife of Umphrey P. Tyler and as one of the persons described in and who executed the foregoing deed of conveyance, who being at the time separate and apart from her husband, the said Mary A. Tyler did then and there make and execute the foregoing acknowledgement, her name being with her own hand subscribed and her seal affixed in my presence.

Witness my hand and seal, at said county of Rock Island, the day and year above written.

EUGENE LEWIS, [NOTARY SEAL.]
Notary Public.

STATE OF ILLINOIS, }
County of Rock Island. }

On this day personally appeared before me Umphrey P. Tyler, to me well known as the person described in and who executed the foregoing deed of conveyance, and acknowledged that he executed the same for the purpose therein expressed; whereupon it is prayed that the same may be recorded.

In witness whereof I have hereunto affixed my hand and seal this seventeenth day of October, A. D. 1883.

EUGENE LEWIS, [NOTARY SEAL.]
Notary Public.

STATE OF FLORIDA, }
County of Brevard. }

Be it remembered that on this 1st day of November, A. D. 1883, I, A. A. Stewart, clerk of the circuit court in and for said county, have duly recorded the foregoing deed of conveyance in the public records of said county.

In witness whereof I have hereunto set my hand and the
22 seal of the said court this day and year above written.

[L. S.] A. A. STEWART, *Clerk.* [SEAL.]

And the plaintiff, further to maintain the issues in his behalf, offered and read in evidence a certain letter patent from the United States to U. P. Tyler, dated March 20th, A. D. 1885, in words and figures as follows:

THE UNITED STATES OF AMERICA.

Certificate No. 6181.

To all — whom these presents shall come, Greeting:

Whereas U. P. Tyler of Rock Island county, Illinois, has deposited in the General Land Office of the United States a certificate of the register of the land office at Gainesville, Florida, whereby it

appears that full payment has been made by the said U. P. Tyler according to the provisions of the act of Congress of the 24th of April, 1820, entitled "An act making further provision for the sale of the public lands," and the acts supplemental thereto, for the lot numbered seven of section twenty-three, and the lots numbered one and two of section twenty-six in township twenty-nine south of range thirty-eight east of Tallahassee meridian in Florida, containing one hundred and seventy acres and forty-two hundredths of an acre, according to the official plat of the survey of the said lands, returned to the General Land Office by the surveyor general, which said tract has been purchased by the said U. P. Tyler.

Now know ye that the United States of America, in consideration of the premises, and in conformity with the several acts of Congress in such cases made and provided, have given and granted, and by these presents do give and grant, unto the said U. P.
23 Tyler and to his heirs, the said tract above described; to have and to hold the same together with all the rights, privileges, immunities and appurtenances, of whatsoever nature, thereunto belonging, unto the said U. P. Tyler and to his heirs and assigns forever.

In testimony whereof I, Grover Cleveland, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the twentieth day of March, in the year of our Lord one thousand eight hundred and eighty-five, and of the Independence of the United States the one hundred and ninth.

By the President:

[L. S.]

GROVER CLEVELAND,
By M. McKEAN, *Secretary.*

S. W. CLARK,
Recorder of the General Land Office.

Recorded vol. H, page 17.

And the plaintiff, further to maintain the issues in his behalf, offered and introduced in evidence a certified copy of the official plat of the survey of that portion of township twenty-nine (29) south, of range thirty-eight (38) east, Florida, lying between Indian river and the ocean, in words and figures as follows:

(Here follows map marked p. 24.)

25 And the plaintiff, further to maintain the issues in his behalf, offered and read in evidence a certified copy of a letter from the Commissioners of the United States General Land Office to W. D. Bloxham, United States surveyor general, land office of Florida, dated April 20th, 1889, in words and figures as follows:

E. 45080–1889. DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE, WASHINGTON, D. C., *April 20th*, 1889. J. S. W. J. A. P. J. V. W.

W. D. Bloxham, Esq., U. S. surveyor general, Tallahassee, Florida.

SIR: I am in receipt of your letter of the 9th instant embodying a report relative to the plat of the subdivisional surveys of certain lands situate between the Indian river and the Atlantic ocean in township twenty-nine (29) south, range thirty-eight (38) east, Florida, as requested by office letter "E" of the 6th instant. Accompanying your letter are copies from the records of several letters regarding public surveys in the immediate vicinity of said land, of instructions to the contracting deputies, and of a note to field-notes of meanders in township twenty-nine (29) south, range thirty-eight (38) east, by George Mackey, D. S., in 1845.

In reply, referring to office letter "E" of the 17th instant transmitting a certified copy of the plat of the subdivisional survey of "that portion of township 29 south, range 38 east, Florida, lying between the Indian river and the ocean," you are advised that said
plat has been accepted by this office as "official" since its
26 receipt, as will be observed from the note endorsed thereon signed "H. F. S."

Not only entries and filings have been allowed in accordance with the metes and bounds of said surveys by the district land office at Gainesville, but the same have been duly accepted and made of record in the tract books of this office. In addition to the entries and filings, various selections of swamp lands have also been made by the State of Florida.

Your suggestion that said survey may have been actually made, but was subsequently rejected by the U. S. surveyor general, may be correct, but this office has no means of verifying the same.

Whether or not said plat was originally duly approved by the U. S. surveyor general need not now be considered. That the plat has been accepted as official by this office and the local land office and lands disposed of in accordance therewith admits of no denial.

Enclosed herewith is a rough diagram showing the various disposals of lands in the fraction of the township in question, as per the records of this office, by which it will be seen that all of the lands therein have been disposed of.

In view of the foregoing statements you are authorized to accept as official the certified copy of the described portion of township 29 south, range 38 east, Florida, as transmitted to you with office letter "E" of the 17th instant.

Very respectfully,

S. M. STOCKSLAGER,
Commissioner.

27 And the plaintiff, to further prove the issues in his behalf, offered and read in evidence the deposition of R. B. Birchfield, duly taken and transmitted by William M. Brown, a notary public, in accordance with the law of Congress in such case made and provided; which is in words and figures following:

C. W. HORNE)
vs.
C. A. and R. T. SMITH.)

On this 8th day of January, A. D. 1891, before me, William M. Brown, a notary public in and for the State of Florida at large, cames Jones & Atkinson, attorneys for the plaintiff, and George M. Robbins & D. L. Gaulden, attorneys for the defendants; also R. B. BURCHFIEL, a material witness in the above cause, whose deposition is to be taken, for the reason that he resides more than one hundred miles from the place where the said cause is to be tried, who, being first duly cautioned and sworn by me, deposes as follows:

(Counsel for the defense objects to the taking of this deposition on the ground that they were not given reasonable notice of this hearing, having been notified at 3.30 p. m. on the 7th, the hearing being called for 9 a. m. on the 8th day of January, giving counsel for defense no chance to consult their clients or to properly prepare the cross-examination of witnesses. The defendants live some sixty miles south of Titusville.)

Question. Mr. Burchfiel, state your name, residence, and occupation.

Answer. Name, R. B. Burchfiel; residence, Georgiana, Florida; occupation at present, county surveyor for Brevard county, Florida.

Question. Did you locate Mr. Horne's property by surveying in Brevard county—that is, lots 1 and 2 of section 26 and S. 28 part of lot 7 of section 23, township 29 S., of R. 38 east?

Answer. I located as best I could under the circumstances the north and east boundaries of said lot 1 and the east and south boundaries of lot 2, in section 26.

Question. Will you please examine this plat and state if it is your work or not, and also whether or not said plat is correct?

Answer. I made the plat referred to and it correctly represents the survey I made of lots 1 and 2 of said section 26, though not showing all the details of survey. (Plat referred to, marked Exhibit "A," is appended hereto as part of this deposition.)

Question. Did you or not find the defendants Smiths residing upon the land at the spot indicated on said plat by the word "Smith"?

Answer. I did.

Question. Please describe the manner in which you made said survey and indicate on the plat where you sat your corners and how you determined them.

Answer. I began on the south boundary of the township in question at the corner of section- 33 and 34, where I found the original corner posts standing (on the west side of the river), having at a previous time identified said corner post by the field-notes. I retraced said township line west for about one-half mile by the marked trees along the line to aid me in determining the true corner of the line, which I found to run west by adjusting a magnetic variation of 1 degree 10′ east. Then, with the course thus determined, I ran east, finding

the line marked on the timber to Indian river. I then con-
29 tinued said line at the same course east across Indian river,
where I found a post, evidently set by some surveyor about
two years before date of this survey. My line was about one foot
south of said post. I then continued the line through to the Atlantic
ocean, finding the distance substantially as given in the field-notes of
township 30, just south of township 29. The plat of this township 29
gives the distance from Indian river to the S. E. corner thereof as 4
chains and 50 links; so at this distance from Indian river I found a
post evidently set by the same surveyor who set the one previously
referred to on the bank of the river. Then from the point 10 chains
and 50 links east of said township corner, which is on the ocean
beach, I ran a traverse line northward along the ocean beach to the
north boundary of said township 29 or to the line which I had
previously set as the south boundary of township 28, finding the
entire distance, calculated by latitude, to be 6 miles 7 chains and
88 links, thus developing an excess of 7 chains and 88 links more
than the plat of said township represents, as the best I can find
out, said plat being very imperfect. The length of many of the
section lines not being given, I then returned to a point 2 miles
north of the south boundary of said township 29, and from there I
measured to a point which would be 2 miles 2 chains and 74 links
north of said township line and 71 chains and 55 links west of the
S. E. corner of said township, which was on the top of the bluff,
some 8 or 10 feet back from the edge thereof, where I placed a post
for the meander corner of sections 24 and 25. I then ran west
parallel to the south boundary of the township 8 chains 45 links,
where I set a post for corner to sections 23, 24, 25, and 26, which
post I marked "S. 23, 24, 25, and 26." Then I continued west same
course as before in scrub 20 chains to hammock, 33 chains
30 from section corner to a grassy slough dry at that time, but
covered with water in wet weather. This slough ran in a
southeasterly direction and was about 200 feet wide. Then, con-
tinuing the line, at 47 chains (from section corner) I passed about
50 feet north of a small clearing of about one acre made by the said
Smith Brothers, the defendants in this case. Then, continuing this
line, 55 chains (from said section corner) leave hammock and enter
marsh. Then at 64 chains and 40 links (from section corner) I
found the east bank of a creek or bayou extending from the north-
ward and about 100 yards wide. This point is about 25 chains east
of Indian river proper, but the whole distance is in a low, wet marsh,
so I placed a post here on the east bank of the creek and returned
to the said section corner and ran south with a variation 2° 35'
east (a course which I had determined necessary to make the clos-
ing on the north boundary of the township, as shown by the plat).
Between sections 25 and 26 at 20 chains and 33 links I set a post for
corner to lots 1 and 2 of section 26. Then, continuing the line, 20
chains and 33 links further on I set a post for corner to lots 2 and 3
of section 26. I then ran west parallel to the south boundary of the
township in scrub 10 chains across scrub to hammock, 29 chains
across hammock to marsh, 36 chains to Mullett creek, about 300

yards south of Smith brothers' residence (the defendants in this case). I have marked all these lines that I ran on the timbers, where there were any. I hunted the whole country in the vicinity of each section line in this township for evidence of the Government survey, but could find nothing at all—neither corner posts nor marked trees.

31 Question. Designate on this map where you set your corners.

Answer. I set the corner to sections 23, 24, 25, and 26 at the point on said plat as indicated by the numbers written there, and the other corners as I have stated before.

Question. State whether or not Mr. Horne's north line and south line produced westward to the bank of the Indian river will include the land on which the defendants Smith are located.

Answer. They would or, to the best of my observation made at the time of survey, if the lines between lots 1 and 2 of said section 26 be continued west to Indian river, could pass through or *by near* the land cleared and cultivated and now resided upon by the said Smith brothers, defendants in this case.

Cross-examination:

Question. Did you survey the shore line of Indian river as shown upon the plat you have introduced in evidence and marked Exhibit "A"?

Answer. I did not.

Question. From the corner of lots 1 and 2 on the line you established as section line between 25 and 26 how far could you see in a westerly direction?

Answer. But a very short distance.

Question. Could you see from that point either of the clearings of the defendants?

Answer. I could not.

32 Question. According to your survey, would the clearings of the defendants be east or west of the line drawn south paralled with the section line from N. W. corner lot 7, in section 23?

Answer. The residence and the greater part of their clearing in which they reside, and which is about seven or eight acres in extent, would be west of said line.

Question. If this line is produced south would it not strike Mullett creek?

Answer. It would.

Question. Is Mullett creek navigable or not?

Answer. It is for shallow-drought boats.

Question. Is it not in fact a part of the Indian river, being formed by islands in the river just off the east bank?

Answer. It might be so considered.

Question. Can you not, as a matter of fact, enter the creek at the north with a good-sized sail-boat and, passing along the east bank of the Indian river, between the bank on the left and islands in the

river on the right, *and* pass out at the south end of the creek into the open waters of the river?

Answer. You can, provided the boat does not draw too much water.

Question. Is there not as much water on the east of the islands as on the west of them?

Answer. The depth of the water in the creek is as great as
33 it is on the west side of the islands for about a quarter of a mile to the westward.

Question. Then this line projected south from the N. W. corner of lot 7 intersects the bank of Indian river, leaving the major part of the large clearing of the defendants and all of the acre clearing to the westward? It also leaves the house and wharf of the defendants to the west of it. Is this not so?

Answer. It is.

(Objection by counsel for plaintiff to the whole of the cross-examination relating to the extension of the west line of lot 7 to the Indian river and the location of the clearings of the defendants with reference to this line as irrelevant and immaterial.)

Question. Running west on the line between sections 23 and 26 you note a slough at 33 chains west from section corner 200 feet wide. Is this slough the segregation line between the highland and the swamp and overflowed land between it and the river?

(Counsel for plaintiff objects to this as irrelevant and immaterial.)

Answer. I cannot say positively. It is the first lowland I find in coming from the ocean beach. It extends for a considerable distance to the southward; don't know how far it extends to the northward, but could only see a short distance. There is plenty of highland to the westward of this slough.

Question. As far as your observations extended, would the dotted line shown upon your plat substantially represent the location and direction of this slough along lots 1 and 2, in section 26, and lot 7, in section 23?

34 (Objection by plaintiff same as above.)

Answer. The course of the slough, to the best of my recollection, where I crossed on the section line, is about the same as the course of the dotted line referred to, but the slough is about 160 feet further west than the dotted line is intended to be. The dotted line was intended to show the meander line of the township plat.

Question. From such water-marks as you noticed at the banks of the slough, what would be the depth of water in it at high stages of water in the Indian river?

Answer. I don't think the water from Indian river ever reaches this part of the slough, except, perhaps, in case of high storms. From the nature of the growth I judge that the water in said slough at this point is fresh water when there is any at all. There was indications of salt water about 200 yards further south.

Question. The corner of sections 33 and 34 on west bank of Indian river was your starting point for this survey. Did you find any other original Government corner on which to tie and check up your work?

Answer. No other corner to make a direct measurement to.

Question. Did you locate this starting point by the bearing trees given in the field-notes?

Answer. Not at this time; have done that on a previous occasion.

Question. How long previous to this survey?

Answer. I think about two years.

35 Question. Were the witness trees to this corner still standing at the time of this present survey?

Answer. I don't remember to have noticed any change since the former survey.

Question. Did you find the trees there on the occasion of this present survey?

Answer. I did not have the field-notes of this corner with me at this time.

Question. Did you see the trees there at this time?

Answer. I don't remember to have looked for them. I only remember that to all appearances the posts were standing at the same points where I identified it before.

Question. When you identified it two years before did you find all the trees called for in the field-notes and at the course and distance mentioned in the notes?

Answer. I don't remember. I only remember that I was satisfied with this identification at the time of the former survey.

Question. When you made the former survey in what direction did you run from this post?

Answer. North.

Question. Had you ever before run a section line from this post east to the river?

Answer. I had not.

36 Question. Did the line that you ran this time pass through a dwelling-house on a hill near the river bank?

Answer. It passed through, or rather over, a low shed attached to the south side of the dwelling.

Question. Was there or not a fence or remains of a fence still south of your line?

Answer. I don't remember any fence there.

Question. Do you know whose house this was?

Answer. It is known as Frank Smith's house.

Question. Does the clearing extend south of your line?

Answer. It does.

Question. Did any of your chainmen mention to you that he had seen the line run south of where you put it?

Answer. No; not that I remember of.

Question. Did you examine south of your line and near the south edge of this clearing for evidence of another line?

Answer. I did not, for the reason that I had the evidence of the township line where I was running.

Question. Can you swear positively that the stakes from which you started this survey had not been moved from the place where you found it two years ago?

Answer. Of course I cannot state positively. Every appearance indicated that it was at the same place.

37 Question. But you say that you did not notice the witness trees on making this second survey?

Answer. I did not notice them.

Question. Running a half mile west from this stake, you found the variation of the section line which you fixed at 1 degree 10 minutes. Did you find the one-half-mile post of the original survey?

Answer. I did not. I merely went westward along the line, noting the blazed trees, until I came to a line tree (a tree marked as standing on the line) which was near a half mile west of the said post.

Question. Was this noted in the field-notes as a line tree?

Answer. I have never found line trees noted in the field-notes of the Government surveys made in this country at the time this survey was made by the Government.

Question. In the manual of instructions for re-establishing lost and obliterated corners, issued by the United States General Land Office for the guidance of local surveyors, is there not an instruction to the effect that the surveyor is not to locate the line by the sole evidence of a line tree unless the tree is mentioned in the field-notes of the survey?

Answer. I have no recollection of such directions. The instructions state that it has been held that line trees noted in the field-notes will govern the line itself. That is my memory of it.

Question. In case you should run a line from a known corner between blazed trees and through line trees not noted in the field-notes and find the corner either to the right or left of the line

38 run would not the true line extend in a straight line from post to post and not through and between blazed trees, according to these instructions of the Land Office?

(Plaintiff objects to the question on the ground that it has no bearing upon the points in issue; that it is irrelevant and immaterial.)

Answer. That would depend upon various circumstances. In these surveys of 1844 and thereabouts the Government surveyors did not as a rule mention any of the line trees in their field-notes. The manual of instructions requiring them to mention such trees is dated 1853, and, so far as my observation extends with the field-notes of these surveys, no line trees are mentioned until after that date. Therefore, none of the line trees being mentioned in these older surveys, when I find them I treat them about the same as I would if they were mentioned in the notes, though there never can be that certainty about them that there would be if they were mentioned. So that I say that the question would vary according to circumstances. These instructions in the manual are not specific in such cases. Sometimes they state the line may be a corner or broken line, and that no specific directions can be given, but that a

great deal must depend upon the ability, fidelity, and perseverance of the surveyor.

Question. In determining the variation on which to retrace this township line what do you consider the best evidence of its direction—the line of trees to which you have testified or the half-mile corner beyond it?

Answer. The half-mile corner would be the best if it stands in the general direction of the line, but if it stands off several feet from the general direction of the line I should not take it as a point of bearing.

39 Question. If it stood off from the blazed line as stated would it not be evidence to you as a surveyor that the blazed line was the random line and the stake was the true line?

Answer. No. No random line was run here. This township line, to the best of my recollection, was run east to Indian river as a true line at first.

Question. Do you testify that as a fact shown by the field-notes of this township line?

Answer. That is my recollection. It is three years now since I saw the field-notes of that line.

(Counsel for defense objects to so much of foregoing testimony as asserts that no random line was run by the original survey on the ground that the field-notes of the survey are the best evidence, and asks that the same be ruled out.)

Continued until 9 a. m. July 9th.

Resumed cross-examination:

Question. How did you produce this township line across the river from your starting point on the west side?

Answer. When I emerged from the hammock into a clearing I found Frank Smith's house intervening between me and the east shore of Indian river. I caused a flog to be placed on the east side of said house on the line. I then carefully noted the bearing of the needle on the line I was running. Then, placing my instrument on the line some 40 feet east of the said house, I continued the line by the same bearing as developed previously. On looking through the telescope I discovered a stake on the east shore of Indian river, about one foot north of my line.

40 Question. Did you triangulate across the river and get the distance?

Answer. I did not.

Question. About what is the distance across the river on your line?

Answer. A little over two miles; possibly two and one-quarter miles—two and one-quarter miles, I will say.

Question. What is the length of your needle on your transit?

Answer. Five and one-half inches.

Question. Did you look for some three to five or eight chains south of the line you adopted on the east side of the river for an-

other line cut through from river to ocean with meander and section corner upon it?

Answer. I did not at that time.

Redirect examination:

Question. You testified in your direct examination to a slough which the defense has intimated might possibly be a line of segregation. State what was the character of that slough and also whether it would be under any circumstances impassible.

Answer. Where I crossed it and some 200 yards to the southward it might be called in wet weather slough or savannah. It was dry and solid at the time I was there, covered with grass about one foot high. Still further to the southward it is somewhat boggy and covered with switch grass, indicating at times that it might be covered with water from Indian river, but I should think it would not be impassible at any time.

(Here follows diagram marked p. 41.)

42 And the plaintiff, further to prove the issues in his behalf, offered and read and introduced in evidence certain pleas which were sworn to by the defendant C. A. Smith, and all of which pleas had been stricken from the record on motion of plaintiff, which are in words and figures as follows:

In the Circuit Court of the United States for the Fifth Judicial Circuit and Northern District of Florida, 1890.

CHARLES W. HORNE }
vs. } Common Law. In Ejectment. Pleas.
C. A. & R. T. SMITH. }

And now come the defendants, by Robbins & Graham and D. L. Gaulden, their attorneys, and for pleas to plaintiff's declaration herein filed say:

2nd. And for a second plea in this behalf defendants say that they reside upon and are in possession of certain unsurveyed lands of the United States in township 29 south of range 38 east, and that they occupy the same as settlers; that there have been two approved surveys of township 29 south of range 38 east, the first of which was made by Deputy United States Surveyor George Mackay in 1844, which was approved by the surveyor general of Florida on March 10th, 1845; that this survey embraced a traverse of the east bank of the Indian river and included within it certain mangrove islands bordering on said east shore and designated as such upon the official plat of said survey; that the second survey was made by Deputy United States Surveyor William S. Harris and approved December 8th, 1859; that said second survey subdivided the land in said township on the east side of the Indian river, and the official plat thereof shows a different meander of the east shore of
43 the Indian river from the meander or traverse shown upon the first map; that said second plat does not show the man-

grove islands exhibited upon the first plat, but the meander line of lot 7, section 23, and lots one (1) and two (2), section 26, upon the second plat *upon said second plat* was established upon the segregation line between the dry land upon the east of it and the mangrove islands upon the west, and runs along a bayou or savannah separating said high land from said swamp or overflowed land; that defendants reside upon unsurveyed land of the United States to the west of said bayou or savannah not shown upon said second plat and the land to which plaintiff claims title lies to the east of said bayou or savannah and is shown upon said second plat by the numbers given in plaintiff's declaration.

Defendants further say that they have begun proceedings in the office of the surveyor general of Florida, under authority given in section 4, page 34, of the Manual of Instructions issued by the General Land Office of the United States, for the survey of the land between said segregation line pursued by the survey of said William S. Harris as his meander line and the actual margin of Indian river, in order that the township plats may be amended to show the actual facts in the case.

3rd. And for the third plea on equitable grounds defendants say that there is a large body of land, aggregating some six hundred acres, to the west of the land to which plaintiff claims title, which appears as water upon the plat under which plaintiff claims; that said land is not accretion formed since the survey under which plaintiff claims, but existed as land at the time of said survey and was negligently omitted therefrom; that said land is shown between the blue and black lines of the accompanying map, which is attached to
44 and made a part of this plea; that defendants are settlers upon

(Here follows map marked p. 45.)

fractional N. W. ¼ of section 26 and the S. ½ of S. W. ¼ of sec. 23 and a part of the west half of the N. E. ¼ of section 26, in said township and range, which is represented upon the plat under which plaintiff claims as being a part of the Indian river. Defendants say that if it should be considered that this six hundred acres of land between the meander line of the plat under which plaintiff claims and the actual margin of Indian river belongs to the entrymen or owners of the lots bordering on the meander line of said plat, there is no rule of law for the allotment of said excess land, and if it be considered that the southwest corner of lot one (1), section 26 ("A" on annexed map), is on the lot line between lots one and two, and also on the river bank, and is therefore determined by the intersection of these two lines at "X," it is obvious that by the same rule the southern point of lot six of section 23 ("B" on said map) is at the intersection of the east line of said lot with the bank of Indian river or at "C," whereby it appears that the land occupied by defendants would belong to lot six, to which plaintiff does not claim title, by the very rule invoked by plaintiff to recover possession of said land.

Therefore defendants say that the boundaries of the land from

which plaintiff seeks to eject them as a part of the land described in his declaration are unsettled and confused and incapable of determination in a court of law, and they pray judgment whether, in the absence of equitable settlement and determination of these boundaries, the action can be maintained against them.

4th. And for a fourth plea in this behalf defendants say that the meander line of the lands described in plaintiff's declaration runs along a bayou or savannah which marks the segregation line
46 between the high land and the swamp and overflowed land lying along the bank of the river; that defendants reside upon unsurveyed land of the United States between said savannah, along which said meander line runs, and the actual margin of Indian river, and not upon the land described in plaintiff's declaration.

5th. And for a fifth plea, under the statute protecting settlers on lands from which they may be ejected to the extent of the value of their improvements, defendants say that they have settled upon and improved the land from which plaintiff seeks to eject them under an equitable title derived from the Government of the United States as settlers upon said land, and that they were informed at the time of their settlement both by the surveyor general of Florida and the Commissioner of the General Land Office at Washington that said land was unsurveyed land of the United States. Defendants further say that their improvements upon said land are worth the sum of two thousand dollars, for which they claim payment in case of ejectment according to the practice by the statute of Florida in such cases made and provided.

C. A. SMITH.

Before me came C. A. Smith and made oath that above pleas are true.

D. A. GAULDEN, [SEAL.]
Notary Public.

And the defendants, by their attorney, to maintain the issues on their behalf, offered to prove by the defendant C. A. Smith that the official plat of the survey of that part of township 29 south, of range 38 east, Florida, lying between Indian river and the ocean, recited in the patent from the United States to U. P. Tyler, was not
47 correct, and that while said plat did not show any unsurveyed land between the lots claimed by plaintiff and the Indian river that in fact there was a large quantity of such land there, and to the testifying of said witnesses to said facts the plaintiff did then and there object on the ground that no evidence was admissable to contradict the official plat of the survey of said township so long as said plat was the official plat according to which sales of land were made and it remained the official plat as recognized by the General Land Office, but the said judge did then and there deliver his opinion and decide that the said objection of the said plaintiff ought not to be allowed, and that the said C. A. Smith ought to be admitted to testify to said facts.

To which opinion and decision of the said judge the said plaintiff, by his attorneys, did then and there, and before the said jury retired to consider their verdict, except.

And the said C. A. Smith testified as follows: "That there was a savannah formed by the waters of the Indian river which make up between our place and the mainland; that it is from a mile to a mile and a quarter on an east and west line from this savannah or bayou to the river; that the land lying between the savannah and the river, which we occupy, is in some places from four to six feet above the level of the river, and that for a mile the land on an east and west line is covered with a growth of live-oak trees, many of them three and four feet in diameter; that there used to be a bar at the mouth of the savannah or bayou formed by the waters of the river, and that during high water in the river the savannah would be filled up to a considerable depth, and when the river fell the water could not get out on account of this bar; that he and his brother, R. T. Smith, had frequently to wade across this sa-
48 vannah in getting to the mainland; that they also thought it bred mosquitoes, so they cut a canal through this bar at the mouth, which drains it and keeps the water in it on the same level with that of the river, and that for this reason there is frequently but little water in the savannah at present, whereas before the cutting of the canal it was nearly always filled."

And to the opinion and decision of the said judge admitting said testimony of the said C. A. Smith the plaintiff, by his attorney, did then and there, and before the retirement of the said jury to consider their verdict, duly except.

And the said parties having concluded and submitted their testimony, the plaintiff, by his attorney, requested the said judge to instruct said jury as follows:

The certified copy of the official map or plat of the lands made and adopted by the Government of the United States and in evidence in this case is as much a part of the patent, also in evidence, as if it had been copied into and made a part of the patent itself.

This plat shows that the western boundary of the lots in question in this action is the waters of Indian river, in accordance with the acts of Congress which require the lines of lots or fractions of a section on navigable rivers, where surveyed, to run to the waters of the river.

Purchasers of the land from the United States buy and the Government sells public lands according to the official maps or plats made by its own officers and kept in its land offices for inspection, to show, among other purposes, to purchasers the location of any given piece of land and its boundaries.

The court instructs you that the plat in evidence in this case, made by officers whose duties require them to make correct surveys and correct plats of all lands of the Government, is presumed
49 to be correct, and it is your duty to be governed by it in making up your verdict.

But the said judge did then and there deliver his opinion and

decide that said charges as requested be refused; to which opinion and decision of the said judge the plaintiff, by his attorneys, did then and there, and before the retiring of the jury, duly except.

And the plaintiff further requested said judge to charge said jury as follows:

"It is not within your power to disregard the survey of these lots as made by the Government and shown by the plat in evidence. If the survey is not correct the executive department of the Government may perhaps correct it by a new survey, and if the patent in evidence conveyed more land to patentee than the Government has received pay for that department can pursue such remedy as the laws give, but this court and jury have no power or authority to deprive the plaintiff of any lands within the boundaries of the lots in question or shown by the official plat in evidence, even though a less quantity of land has been paid for than is included in such boundaries."

And said judge did then and there deliver his opinion and decide that said charges as requested be refused, and did refuse to give the same; to which opinion and decision the plaintiff, by his attorney, did then and there, and before the retiring of the jury, duly except.

And the said judge did then and there give his opinion and deliver his charge to the jury "that it is the rule that the meander line is not the boundary line; they are run not as boundaries of the tract, but for the purpose of finding the sinuosities of the bank of the stream.

Fractional divisions made so by the water are designated
50 and sold by the numbers attached to and reference is always had to the notes and maps of the survey. The water in the notes is the boundary, and when there exists a difference between the meander line as run and the actual margin of the stream or lake the water is the true boundary, but the rule has its limitations, as, for instance, a case in Polk county with which I am familiar, where there is fifteen miles intervening between the meander line and the margin of a lake, this breaks the rule, and I charge you that when, as in this case, there is from three-fourths of a mile to a mile and a quarter between the meander line and the actual margin of the river, and when for half a mile in width this land has upon it oak trees, some of which are from three to four feet in diameter, especially where the waters of the river make up, forming a bayou which conforms substantially to the meander line of the Government survey, this is not within the rule."

And the plaintiff, by his attorney, did then and there and before the retiring of the jury, duly except to that portion of said charge which states the law to be that if there is from three-fourths to a mile and a quarter of land between the meander line and the actual margin of the river, which is the boundary as shown by the plat, and trees are growing thereon from three to four feet in diameter, etc., the general rule that the actual margin of the river and not the meander line is the boundary would not govern such a case, and

to that portion of said charge which submits to the jury the question whether or not the official plat is correct.

And the said judge, under the charge and with the directions aforesaid, submitted the said issues and evidence so given on the said trial to the jury, and the jury aforesaid then and there gave this verdict for the said defendants:

Whereupon the court aforesaid, on the 30th day of June, A. D. 1891, at the term aforesaid, did render judgment, as appears
51 of record, and inasmuch as the said several matters objected to or insisted upon and considered by the court do not appear by the record of the verdict and judgment aforesaid, the said plaintiff, by his attorneys aforesaid, did then and there propose this his bill of exceptions to the said opinions and decisions of the said judge, and request him to sign and seal the same according to law, which is done this day of 30th Oct., A. D. 1891.

CHAS. SWAYNE, [SEAL.]
U. S. Judge.

52 The President of the United States to the honorable judges of the circuit court of the United States for the northern district of Florida, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Charles W. Horne, plaintiff, and C. A. Smith and R. T. Smith, defendants, a manifest error hath happened, to the great damage of the said plaintiff, Charles W. Horne, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment therein be given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the 6th day of July, A. D. one thousand eight hundred and ninety-one, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 8 day of June, in the year of our Lord one thousand eight hundred and ninety-one.

PHILIP WALTER, *Clerk.*

Allowed by—

_____.
District Judge.

53 [Endorsed:] 23. Supreme Court of the United States. Charles W. Horne, plaintiff in error, *vs.* C. A. Smith and R. T. Smith, defendants in error. Writ of error. Filed June 8th, 1891. Philip Walter, clerk.

54 UNITED STATES OF AMERICA, *ss.*

To C. A. Smith and R. T. Smith, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the 6th day of July, A. D. 1891, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Florida, wherein Charles W. Horne is plaintiff in error and C. A. Smith and R. T. Smith are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 8th day of June, in the year of our Lord one thousand eight hundred and ninety-one.

CHAS. SWAYNE,
District Judge.

Service of *the* this citation is hereby accepted and receipt of a copy thereof acknowledged by the defendants in error, C. A. Smith and R. T. Smith.

June 20th, 1891.

GEO. M. ROBBINS,
D. L. GAULDEN,
Att'gs for Defendants in Error.

55 [Endorsed:] Supreme Court United States. Charles W. Horne, plaintiff in error, *vs.* C. A. Smith & R. T. Smith, defendants in error. Citation. H. Bisbee, for plaintiff in error.

56 Know all men by these presents that we, Charles W. Horne, as principal, and Roderick G. Ross, as surety, are held and firmly bound unto C. A. Smith and R. T. Smith in the full and just sum of five hundred dollars, to be paid to the said C. A. Smith and R. T. Smith, their executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 30th day of April, A. D. 1891.

Whereas lately, at a term of the circuit court of the United States in and for the northern district of Florida, in a suit depending in said court between Charles W. Horne, as plaintiff, and C. A. Smith and R. T. Smith, as defendants, judgment was rendered against the said Charles W. Horne, and the said Charles W. Horne having obtained a writ of error to reverse the judgment in the aforesaid suit and a citation directed to the said C. A. Smith and R. T. Smith, citing them to be and appear at a Supreme Court of the United States, to be holden at Washington the 6th day of July, A. D. 1891:

Now, the condition of the above obligation is such that if the said Charles W. Horne shall prosecute this writ of error to effect and

answer all damages and costs if he fails to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

C. W. HORNE. [SEAL.]
RODERICK G. ROSS. [SEAL.]

Sealed and delivered in the presence of—

——— ———.

The foregoing bond is approved this 8th day of June, A. D. 1891.

CHAS. SWAYNE, *Judge.*

57 I, Philip Walter, clerk of the circuit court of the United States, fifth judicial circuit, in and for the northern district of Florida, do hereby certify that the foregoing pages, numbered from 1 to 53, inclusive, constitute a true copy of all of the proceedings and a correct transcript of the record of the judgment in the case of Charles W. Horne, plaintiff, *vs.* C. A. Smith and R. T. Smith, defendants, as appears upon the files and records of my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 31st day of October, A. D. 1891, and of our Independence the 116th year.

[Seal U. S. Circuit Court, Northern Dist. of Florida.]

PHILIP WALTER, *Clerk.*

Endorsed on cover: Case No. 14,923. N. Florida C. C. U. S. Term No., 672. Charles W. Horne, plaintiff in error, *vs.* C. A. Smith and R. T. Smith. Filed November 2, 1891.